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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-636 and No. 75-672
(Consolidated)

No. 76-636
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

No. 75-672
T.I.M.E.-D.C., INC., *Petitioner*
v.
UNITED STATES OF AMERICA, *Respondent*

**On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY BRIEF FOR PETITIONER INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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## REPLY BRIEF FOR PETITIONER INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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This case presents questions as to : (1) whether a seniority system is *bona fide*—and thus lawful under Title VII § 703(h), (see our original brief, pp. 36 to

43); and (2) what is the appropriate remedy in Title VII cases in which an employer is shown to have discriminated in hire and job placement [1] (see our original brief at pp. 43 to 56).

The Government contends that two unlawful employment practices have been committed in this case: first, a pattern and practice of discrimination by the employer against blacks and SSA in hiring for OTR jobs; and, second, application of a seniority system negotiated by the employer and union that perpetuates the effects of past discrimination in hiring. It is our position that under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, the first, if proved, states the employer's violation of § 703 against the class of "identifiable applicants who were denied employment because of race

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[1] We assume in this brief that such employer discrimination has been established.

Actually, it has not. For statistics as to disparate incumbency in 1971 are inapposite to the question as to the hiring patterns from 1965 to 1971. See Petition For Certiorari in 75-636 at § 3, pp. 24ff. and Amicus brief in 75-6712 filed by the Equal Employment Advisory Council.

Unions representing T-DC workers had no reason to be on notice of unlawful hiring practices after July 1965, the effective date of the Act. For from '65 to '71 there were less employees—but more minorities—and there is no statistic in this record by which it can be ascertained that blacks or SSA's were denied and whites preferred employment during that period.

To the contrary, the record affirmatively shows that during this period T-DC was merging freight carriers, acquiring operating rights and going concerns, including incumbent employees. See Opinion of Court of Appeals at note 6; 517 F.2d 299 at 304.

So there was little or no road hiring during this period other than the acquisition of going concerns. Unions, aware of the merging trends and consequent *layoffs*, were not on notice of any claim of unlawful *hiring* practices during this time.



after the effective date of Title VII" (*Id.* at 750),[2] but that the second claim does not state a valid Title VII cause of action.

The Government's late-filed brief substantially shifts its grounds, and does not attempt to defend all that was held by the Court of Appeals. In this reply we first give attention to and answer that which the Government now says, then address in the light of the Government's brief that which the Court of Appeals held.

## THE LAW TO BE APPLIED *

### 1.

The Government argues (Brief, pp. 40ff) that "a seniority system which requires victims of racial discrimination to forfeit their accrued competitive status seniority in order to transfer to a job previously segregated on the basis of race, perpetuates the effects of prior discrimination."

The fact is that the seniority system here applied [3] does *not* require forfeiture of seniority which, absent the employer's racial discrimination, any victim would have enjoyed. To the contrary, this seniority system is structured to assure any or all identified victims of

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[2] Cf. 424 U.S. 747 at 757-8. The beneficiaries of the *Franks'* decree were not merely "identifiable", they were identified, i.e.

> "The black applicants for OTR positions comprising class 3 are limited to those whose applications were put in evidence at the trial."

[3] See our original brief 24-33.

* This subject is more fully developed and discussed in the Brief *Amicus* of AFL-CIO in #76-333, *United Air Lines, Inc.* v. *Evans*, in which certiorari has been granted.

the employer's racial discrimination of their "rightful place". See our original brief at pp. 42 ff.[4]

To be sure, as this Court recognized in *Franks,* where any seniority system applies, if the employer discriminates in hire (or assignment or discharge), a potential consequence is that the hiring discriminatees will be adversely affected in that they "will perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to (the) benefits (allocated according to seniority) his inferiors." (*Id.* at 768). But, since this adverse effect is the direct product of the hiring system and is therefore confined to the individuals that the particular employer has actually discriminated against in hire (as opposed to minority persons generally whom that employer has not discriminated against and who are therefore in their "rightful place in the hierarchy of seniority" (*Id.*)), the Court also recognized that the "underlying legal wrong affecting them is *not* the alleged operation of a racially discriminatory seniority system." (*Id.* at 758; emphasis added).

Section 706(g), the Act's remedy provision, in turn, "empower(s)" the federal courts upon finding such a § 703 violation to "mak(e) whole insofar as possible the victims of (the unlawful) discrimination". *Id.* at 764. *Franks* also concludes that "... a seniority remedy slotting the victim in that position in the seniority system that would have been his (but for the discrimination) ... will be necessary to achieve the 'make whole' purposes of the Act." (*Id.* at 765-766). Thus § 703(a)(1)'s

[4] Cf. Brief for Southern Conference of Teamsters in #75-715, to be argued this day, *Southern Conference of Teamsters* v. *Rodriquez,* at pp. 27, ff.



prohibition against the employer's discrimination in hire and assignment, and § 706(g)'s grant to the courts of the authority to fashion 'make whole' remedies, provide complete assurance that post-Act victims of racial discrimination will "obtain (their) rightful place in the hierarchy of seniority according to which ... employment benefits are distributed." (*Id.* at 768). It is therefore plain that as to those victims of the employer's racial discrimination, the Act's purpose, "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin" (*Id.* at 763), is fully served, so long as the Government had the opportunity to prove that the employer's hiring and job allocation system was discriminatory. Effectuation of that purpose does not require demonstration also that application of the seniority system is an additional § 703 violation. The latter is surplusage, adding nothing to the remedy, and serving only to complicate the trial of the case against the employer, and to confuse the law.

2.

The Government next argues that Title VII, in § 703(h), "does not safeguard (from a § 703 charge) applications of a seniority system which discriminates between incumbent workers on the basis of prior discriminatory job category assignments."

The "discrimination" here is against 2600 "local" or "city" employees, over 2000 of whom are white, and less than 400 of whom are black or SSAs. Again, this differentiation is, as we have shown in our main brief at pp. 19ff, based on the economics of the industry and not on race. The differentiation is thus not discrimination

within the meaning of § 703(c) which defines the only unlawful labor organization practices.

Moreover, the seniority system at bar falls within the protection of § 703(h) in which the Congress has specified:

> "(h) notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a bona fide seniority * * * system * * * provided that such differences are not the result of an intention to discriminate because of race, color * * * or national origin."

The Government's reading of Title VII's legislative history (Brief, p. 45 ff) proceeds on a misunderstanding of the legislative process and the basic holding in *Franks* which was concerned with the proper interpretation of "the remedial provisions of Title VII, specifically § 706(g)." (*Id.* at 762.) And, the 1972 EEO Act did amend § 706(g). (See *Id.* at 763-765 at n.21.) In *Franks,* this Court therefore canvassed the legislative history of this clearly relevant 1972 amendment to the provision before it. (See also, *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 414, n.8, 420-421, which, like *Franks,* turned on § 706 and for that reason discussed the 1972 amendments.)

But the question to which the court below addressed itself was not only one of remedy but of what acts are to be deemed discriminatory and hence unlawful employment practices. The 1972 amendments throw no light on this § 703 question.

The 1972 EEO Act revised the enforcement mechanism of Title VII and covered certain employers previously excluded from the reach of that Title. Only one narrow, and entirely non-controversial amendment to § 703, completely removed from the problem presented here, passed the Congress in 1972.[5] Indeed, so far as we are aware, no legislative proposal touched on the application of seniority systems otherwise lawful where the "effect is to perpetuate the disadvantages accruing from prior discrimination". Accordingly, the Committee Reports and the floor debate are barren of meaningful discussion relevant to the proper resolution of this case. Since Congress's attention was directed elsewhere, the 1972 legislative history does not provide guidance to the courts in determining what conduct constitutes an unfair employment practice. Certainly, nothing in the 1972 EEO Act, or its legislative history, can be considered a legislative ratification of any lower court decisions interpreting § 703.[6]

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[5] That amendment was described as follows in the Section By Section Analysis of H.R. 1746, 118 Cong. Rec. 7166 (1972):

> SECTIONS 8(a) and (b)
>
> These subsections would amend sections 703(a) and 703(c)(2) of the present statute to make it clear that discrimination against applicants for employment and applicants for membership in labor organizations is an unlawful employment practice. This subsection is merely declaratory of present laws as contained in the decisions in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971); *U.S.* v. *Sheet Metal Workers International Assn., Local 36,* 416 F.2d 123 (8th Cir. 1969); *Asbestos Workers, Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir 1969).

[6] The Government's suggestion, Brief p. 51, that the 1972 Legislative History is pertinent to interpretation of § 703 of the 1964 legislation is met at p. 16, note 13, *infra.*

Here it is sufficient to note that the materials specified by the Government related to bills which were rejected. And the Conference Committee Bill, passed as amended, made no reference either by its terms, or in its legislative history, to seniority questions.

The doctrine that "perpetuation" of the employer's discrimination is itself unlawful, is fundamentally unsound because Congress did not intend to protect the rights of pre-Act discriminatees against the seniority advantages which whites (or other non-discriminatees) obtained before the Act; instead, when the issue was raised in the debates, Congress deliberately chose to preserve existing seniority rights, as an essential part of the compromise which made enactment of the bill possible.

Title VII was authoritatively explained as having prospective effect only;[7] and it was amended in the course of its passage by the addition of § 703(h) expressly to protect existing seniority rights, as detailed in the *Franks* opinion, 424 U.S. at 759-761. (Cf. our original brief at 50-53.)

But the Government says, Brief, p. 47 at n. 59, that a seniority system which "perpetuate(s) the effects on incumbent employees of prior discriminatory job assignments * * *" is not protected by § 703(h). It relies on *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505, 515-517, and cases which, in turn, cite it.

*Quarles* holds "a department seniority system *that has its genesis in racial discrimination* is not a *bona fide* seniority system," 279 F. Supp. at 517, emphasis added.

We have shown that our seniority system did *not* have its genesis in racial discrimination (original

[7] Ordinarily a statute operates only prospectively," ". . . a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible impact of the terms, and the manifest intention of *the legislation.*'" *Greene* v. *U.S.*, 376 U.S. 144, 160.



Brief, pp. 19 ff); and the Government has not challenged the fact that our system in *bona fide*.

So *Quarles*, or other cases rooted in segregated unions, and segregated facilities, with blacks limited to the yard gang, while whites were assigned on the "line of progression" escalator, have no application to the instant case.

If the *Quarles* line of cases be otherwise interpreted to outlaw *bona fide* seniority systems which "perpetuate" the employer's racial discrimination, it runs afoul of the legislative history of the 1964 Act. For the Congress was precise that no cause of action was provided to pre-Title VII discriminatees to attack a seniority system on the ground that the system fails to remedy the effects of pre-Act discrimination.

Title VII, far from providing for retrospective effect, was authoritatively explained as having prospective effect only; and it was amended, in the course of passage, by the addition of § 703(h) to expressly protect existing seniority rights. This Congressional action, detailed in the *Franks* opinion (424 U.S. at 759-761) is, even absent the presumption of nonretroactivity, dispositive against the *Quarles-Papermakers* line of decisions—as we next show.

As this Court observed in *Franks*:

> The initial bill reported by the House Judiciary Committee as H.R. 7152 and passed by the full House on February 10, 1964, did not contain § 703 (h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to

respond to criticism that Title VII would destroy existing seniority systems by placing an interpretive memorandum in the Congressional Record. 424 U.S. at 759 footnotes omitted.

The full text of the memorandum pertaining to seniority status is set out at note 15 of the *Franks* opinion, 424 U.S. at 759.

At the same time, Senator Clark placed in the Congressional Record a Justice Department statement assuring that under Title VII "any differences in treatment based on established seniority rights would not be forbidden by the Title." This is set out in *Franks* at note 16, 424 U.S. at 760.[8]

Senator Clark also introduced into the Congressional Record a set of answers to a series of questions propounded by Senator Dirksen, two of which are pertinent to the issue of seniority and appear at note 16 of the *Franks* opinion, at p. 761.

These assurances that the bill "is not retroactive," that "Title VII would have no effect on seniority rights existing at the time it takes effect" and that the bill "will *not* require employers to change existing seniority lists" could not have been plainer or more unqualified. Yet so great was the concern that existing seniority rights be preserved and protected, and so essential was the cooperation and approval of Sen. Dirksen, the min-

[8] 110 Cong. Rec. 7207 (1964) quoted in *Franks*, 424 U.S. at 760, n. 16. The memorandum had been prepared by the Department "in rebuttal to the argument made by the Senator from Alabama (Mr. Hill) to the effect that Title VII would undermine the vested rights of seniority * * * and that Title VII would impose the requirement of racial balance" (110 Cong. Rec. 7213). Senator Hill was then the Chairman of the Committee on Labor and Public Welfare.



ority leader, if the filibuster was to be broken and a civil rights bill enacted, that steps were taken to make assurance "double sure." That was the function of § 703(h).

3.

The Government's attempt at distinction between the effect of the seniority system upon rejected minority applicants on the one hand, and incumbent minority city employees on the other, (Brief at 48-50) is without practical or logical basis. The applicant for a road job who was turned down for that job and offered a city job is not worse off than the road applicant who was denied any job at all. On the contrary, he is better off, because he was given a choice between taking a city job or looking elsewhere, a choice not open to the applicant who was turned down completely. And if the situation of the two applicants is compared only with respect to seniority, the minority applicant who took a city job is better off than the applicant who received no employment at all and who therefore obtained no seniority benefits with this employer.[9]

Moreover, even if the equities of past discriminatees were greater where they have been hired into a city job rather than into none at all, or the legitimacy of the expectations of the white incumbents in the two situations could somehow be differentiated, the courts would still

[9] Similarly, it matters not to an employee whose expectations are defeated whether he is suddenly made junior to an individual who has been working in a different department, or one who has been working for a different employer. In either situation the job security which he has built up over the years is undermined by the operation of the Act. And this, of course, is the precise result against which Sen. Hill had warned, but which the proponents of Title VII unequivocally disavowed.

not be free to write that distinction into law. For, the legislative record is clear that Congress drew no such lines, adopted no such sophisticated distinctions, but unqualifiedly and unequivocally determined that the Act would be wholly prospective in its operation and that existing seniority rights would be preserved.

4.

The Government asserts (Brief, p. 52), "the Court of Appeals correctly ruled that in a case where a pattern and practice of discrimination (has) been proved an incumbent minority employee seeking rightful place seniority relief who is a member of the affected class (1) is entitled to a rebuttable presumption that he was a victim of discrimination, and (2) need not necessarily have unsuccessfully applied for a vacant, rightful place job to be entitled to relief."

As we have shown, the only unlawful act is the employer's, in denying "road" assignment to "x" number of blacks and SSAs.[10] It will not do to *assume* (as does the Court of Appeals, P.A. 34.) that all 400 minorities opted for a road job; any more than we can assume that over two thousand "city" whites did so. So "x" remains unknown.

The "affected class" as asserted by the Government throughout its brief, and defined by the Court of Appeals is "x" plus "y", i.e., *all* minority employees. This is a contrived and unrealistic figure. Until the actual "affected class" is defined and identified, the problems which the Government speaks to at Brief 52ff. are not yet here for decision.

[10] Blacks who did not seek road employment; or who were not qualified for road employment, or who opted for road employment when none was available—are in no different position than whites who did not seek road employment, or who were not qualified for such work, or who were denied it because there was no vacancy. We may not *assume* that all blacks were adversely affected any more than whites were. A showing that no blacks were on the road does not show that any identifiable black was denied road employment.



When they are, the NLRB experience, which we detail at 20ff., *infra,* should be followed.

Having responded to the Government's assertions as to its version of what the Court of Appeals meant, we now return to the basic issues tendered by our Petition for Certiorari, first addressing the practical operation of the seniority system, then commenting upon the appropriate remedy due the actual victims of the employer's discrimination.

## THE SENIORITY SYSTEM

1.

The Government does not contest *bona fides* of the seniority system. Instead the Government insists that regardless of the *bona fides* of the system, if it operates to impede movement of victims of the employer's racial discrimination from a status quo it is *per se* unlawful.

The very purpose of any seniority system is to preserve incumbents' jobs.[11] The protection of an incumbent necessarily means a degree of deterrence of those who would displace incumbents. Surely Congress un-

[11] Cf. Millis & Montgomery, *Organized Labor,* McGraw-Hill Book Co., Inc., N.Y. 1945, pp. 455ff; Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv. L. R. 1532, 1535 (1962).

As this Court held in *Humphrey* v. *Moore,* 375 U.S. 355 at 346, 347; "Seniority has become of overriding importance and one of its major functions is to determine who gets or who keeps an available job."

derstood this when it validated *bona fide* seniority systems.

The seniority system here does, indeed, operate to deter (but not to block) all *local* employees, white or black, from movement. The more than two thousand whites, and almost 400 blacks and SSAs, enjoy seniority protection in their local employment. Those with the most seniority have (by reason of the seniority benefits provided through collective bargaining) the pick of the local runs, and this is true whether white or black or brown. Doubtless the greater their local seniority the more they will ponder a move to another classification where competitive seniority begins anew. The 20-year city man will be less likely to move city to road than the 2-year city man. But this deterrence is not based on race; it applies to all, whatever color.

Similarly, in an industrial seniority situation where the employee of a Chicago manufacturer wishes to move to a plant in the "Sun-belt" where he believes his chances for ultimate advancement are superior, he is less likely to move if he must abandon 20 years of seniority in Chicago and begin anew in Los Angeles, Phoenix or Atlanta.

But this deterrence does not make the Los Angeles, Phoenix or Atlanta industrial seniority patterns unlawful. For if there are lawful seniority listings, and consequent lawful seniority expectations of incumbent Sun-belt employees, these remain *bona fide* and lawful even though minority employees (even those of the same employer) opt to move in from the North.

The deterrence of movement is not occasioned by race or color—it is a function of any seniority system



that movement from status quo to some different relationship is inhibited by *any* seniority system.[12]

2.

*Griggs*, 401 U.S. 428, does not help the Government in this case. To hold that an employer's testing procedure which was not related to actual job content, or to job performance, and which was "used" to discriminate against blacks was discriminatory, (as this Court did in *Griggs*) was to follow the Congressional mandate of § 703(h) of the Act which authorized the use of "any professionally developed ability test" that is not "designed, intended, or *used* to discriminate because of race . . ." 401 U.S. at 433, emphasis this Court's. The test in *Griggs* was, indeed, *used* to disqualify blacks.

The Congress was more protective of seniority practices than it was of the employer's testing practices. Seniority systems were validated, if *bona fide*, "provided that such differences are not the result of an *intention* to discriminate because of race, color, religion, sex or national origin * * *" § 703(h) first 15 lines (emphasis added).

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[12] The Government brief ignores the fact that for 40 years NLRB has been deciding which is the appropriate unit for Collective bargaining. (See our original brief at p. 29ff.) And craft and departmental units have as often been designated as have plant-wide or industrial units. Seniority listings within such units, or, as here, within separate road and city units which NLRB has designated are surely *bona fide*. (See *Georgia Highway Express*, p. 29 of our main brief.)

The Second Circuit has recently held that there is "no sufficient basis for distinguishing between facially neutral departmental and plant-wide seniority systems," in determining the effect of § 703 (h) as an exception to liability under the Act. *Acha* v. *Beame*, — F.2d — (C.A. 2, 1976); 12 F.E.P. Cases 257 at 262.

Literally then, application of a *bona fide* seniority system is not in itself unlawful unless "the result of an intention to discriminate because of race or color * * *". The *bona fide* seniority system now before this Court is not the result of such intention. (See our original brief at pp. 19-33.)

3.

The Government's limited reference to the legislative history of Title VII,[13] asserts that the "broad purpose of Title VII justifies the decision of the Court of

[13] The single reference (at Govt. Brief, pp. 50-51) to S.Rep. No. 92-415, 92nd Cong., 1st Sess. 5, 8 (1971) is inapposite here. The reference at page 8 is to "employment practices and policies which discriminate on the basis of sex, and have accordingly, set the necessary legal precedents for dealing with *this form of discrimination.*" (Emphasis added).

The reference at page 5 acknowledges that the 1964 Act was passed in reliance on conciliation intended to mellow those whose ill-will resulted in isolated and distinguishable discriminatory events. It then lists in a footnote "the subsequent literature on the subject which "*generally describe the problem* in terms of "systems" and "effects." (emphasis added).

General description of the problem can hardly be transformed into what the Government now claims as "Specifically endorsed the interpretation which had prevailed in the courts" (Gov't. Brief, p. 51). Such "endorsement" could not be derived from Committee reference to "general description" in a bill S. 2215 which was not enacted. The 1972 legislation was of H.R. 1746, as amended in the Senate and later explained in Conference Report of March 2, 1972.

The bill which was enacted was accompanied by a "Conference Report" as H.R. 1746 (3/2/72). Neither it, nor the House Report on H.R. 1746 (June 2, 1971) so much as mentions seniority. The Section by Section Analysis was not before this Committee. The assumption in the Section By Section Analysis ("it was assumed") that lower court decisions as of that time would govern the interpretation of Title VII "(i)n any area where the new law does not address itself" is just that—*an assumption.* It does not purport to be, and cannot be, a wholesale enactment of these lower court



Appeals—otherwise we "... deny protection to a generation of incumbent minority workers who have worked under a discriminatory system." (Brief, p. 51). Not so.

The foundationstone of the Government's argument is that "incumbent minority workers" are so thoroughly and well protected by the existing seniority provisions that they are loath to risk the loss of them by taking chances in other employment. (Cf. Court of Appeals opinion at P.A. 31-32.)

As a practical matter, the certain way to "deny protection to a generation of incumbent minority workers" is to abolish—or so weaken as to make ineffective —the seniority system which means job security.[14]

decisions—whatever they may have held, regardless of their reasoning and mutual consistency or inconsistency—into positive law. Nor, consistent with accepted principles of statutory interpretation, can this statement in the Section By Section Analysis be given weight in interpreting Title VII as enacted by the 1964 Congress. Even at best, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (*United States* v. *Price*, 361 U.S. 304, 313.) And here, the entire legislative history and the very breadth of the statement negate the possibility that the 1972 Congress in amending certain sections of Title VII focused on what was intended by the 1964 Civil Rights Act with respect to "area(s) where the new law does not address itself * * *," or studied the whole corpus of lower court decisions interpreting Title VII in those areas.

[14] And courts are regularly doing just that, e.g., in *Sagers* v. *Yellow Freight*, 529 F.2d 721 there is injunction against even presenting a seniority claim involving a member of the affected class to the established grievance body. And the Government is presently urging the Fifth Circuit in *U.S.* v. *ETMF*, (pending before the Fifth Circuit as No. 75-3332) "... to vacate the provision in the decree which refers challenges to seniority dates to Teamster grievance committees." Brief of the United States and the Equal Employment Opportunity Commission as Plaintiffs-Appellants to the Fifth Circuit, filed December 3, 1975 at p. 52.

4.

The Solicitor General in his "Memorandum for the United States as Amicus Curiae" in #75-182, *EEOC* v. *Jersey Central Power & Light Co.,* advised this Court that (despite the EEOC view to the contrary) "... layoffs of employees in the reverse order of their seniority if made pursuant to the terms of an otherwise *bona fide* companywide seniority system, do not discriminate against any individual ... because of such individual's race (42 U.S.C. 2000e-2(a)) ..."

And in the present brief (at p. 48) the Government asserts:

> Rather than making seniority illegal, Title VII enforcement merely means that earned seniority will be protected within the established seniority system when the victims of discrimination take their rightful place in job categories from which they previously were excluded.[15]

"City" or "local" employees, regardless of race or color, have "earned seniority" only within their city or local classifications. That "earned seniority" is fully protected by the system which the Government here attacks.

Moreover, and dispositive of the Government's claim, is the fact that the collective bargaining agreements provide contract machinery by which "any individual" who is the victim of seniority discrimination is to be made whole both in back wages and seniority allo-

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[15] We agree—but find this hard to square with the Government's assertion two pages later (at p. 50) that: "... the post-Act application of the seniority system to perpetuate discrimination, itself constitutes the requisite statutory violation."



cation (see our original brief at pp. 42-43). And as the union has redundantly stated (long before this Court's *Franks* opinion) any individual denied road employment because of race should be awarded the road seniority he would have enjoyed absent the employer's refusal to grant him road employment. See our original brief at p. 30ff.; 43.

The assumption repeatedly stated by the Government and the foundation of its entire case against the union, that the seniority system "locks in" the minorities, thus is unsupportable. For any victim of racial discrimination has a contract remedy to attain rightful place—and if he chooses the courthouse, rather than the grievance procedure to attain that rightful place, that, too, is available. The "lock in" theory just has no application here, for there is no proof of specific acts of discrimination against specific individuals who are claimed to have been locked in.

Again the Solicitor General's amicus brief in *Jersey Central* becomes pertinent. He there advised this Court (Memorandum, p. 3):

> But the Act does not require giving black (or other minority-group) employees enhanced seniority rights on the basis of their race simply because other black applicants were previously denied employment on the basis of their race. Treating black employees *differently for purposes of layoffs solely because they are black, when they have not themselves previously suffered individual discrimination by the employer, would amount to preferential treatment on the basis of race* within the meaning of Section 703(j) of the Act, 42 U.S.C. 2000e-2(j). (Emphasis added.)

5.

Forty years of NLRB precedent in ascertaining who has been the victim of discrimination in regard to hire or tenure of employment in violation of § 8(a)(3) of the Labor Act,[16] has been ignored by the Court of Appeals and in the Government's brief here. *Franks* stresses that:

> As we made clear in Albemarle Paper in utilizing NLRA as the remedial model for Title VII, references must be made to actual operation and experience as it has evolved in administering the Act .... If victims of racial discrimination are under Title VII to be treated differently and awarded less protection, than victims of unfair labor practice discrimination under the National Labor Relations Act some persuasive justification should appear. That no justification exists doubtless explains the position of every union participant in the proceedings before the Court in the instant case arguing for the conclusion we have reached. 424 U.S. at 774-775.

Just as the Fifth Circuit in *Franks* gave "less protection than victims of unfair labor practice discrimination under the National Labor Relations Act would have received," and provided this "less protection" without "persuasive justification" '; so in the instant case the Fifth Circuit has awarded more protection than the victims of unfair labor practice discrimination under the National Labor Relations Act would have received, and again no persuasive justification appears.

Significantly, not a single NLRB case is even mentioned in the Government's brief. The experience of the agency which enforces the statute banning employ-

[16] 29 U.S.C. § 158(a)(3).



ment discrimination which was the model upon which Title VII was constructed is totally ignored.[17]

**REMEDY**

1.

As this Court has said in both *Albemarle* and *Franks* the Labor Act is the "model" upon which Title VII was constructed. NLRB "makes whole" the victims of employment discrimination by requiring their placement in the positions they would have occupied but for the employment discrimination. This requires NLRB to focus upon individual workers—and to evaluate the pertinent facts regarding each claimant to ascertain whether the employer's discrimination has adversely affected him.

It is not sufficient merely to determine that an employer is wont to discriminate; or even that the employer has engaged in gross violation of the § 8(a)(1) proscription against interference, restraint or coercion contained in the Labor Act. Such findings will justify "cease and desist" injunction, but not reinstatement, back pay or award of seniority rights.[18]

Only when it is demonstrated that as a result of employment discrimination identified individuals have lost wages and seniority standing may these be pro-

[17] Nor has the Circuit Court here, or in other Title VII cases made any use of its Labor Act experience. NLRA is in one pigeonhole, and Title VII in a separate file.

[18] See *NLRB* v. *Dan River Mills*, 274 F.2d 381. (CA 5, 1960); *NLRB* v. *Fox Mfg. Co.*, 238 F.2d 211 (CA 5, 1956); *NLRB* v. *Newton Co.*, 236 F.2d 438 (CA 5, 1956); *NLRB* v. *McGahey*, 233 F.2d 406 (CA 5, 1956); *NLRB* v. *Coates & Clark, Inc.*, 231 F.2d 567 (CA 5, 1956); *NLRB* v. *Mason & Hanger, etc.*, 449 F.2d 425 (CA 8, 1970).

vided[19] For the NLRB's power (like those provided in Title VII) are remedial, not punitive—and the Board is powerless to do more than restore that which would have been attained absent discrimination. NLRB's remedial powers are limited to "making whole" those who as "a consequence of the unfair labor practices found by the Board" have actually been deprived of statutory rights.[20]

Cf. 2 Legis. History of NLRA at p. 2332 quoting Senator Wagner in floor debate in reference to § 1 ) of the Labor Act: ". . . the Board will be empowered to issue orders forbidding violation of the law and making restitution *to those who have been injured thereby.*" (Emphasis added).

The NLRB's attempts to compensate *all,* when only a few were adversely affected, was halted here. See *United Brotherhood of Carpenters, etc., supra,* 365 U.S. 651[21] where this Court held, there must be "sup-

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[19] Cf. Morris, The Developing Labor Law, B.N.A. for ABA Section of Labor Relations Law, 1971, at 115ff.

[20] Op. Cit. at pp. 841ff. Cf. *Consolidated Edison* v. *NLRB,* 305 U.S. 236; *NLRB* v. *United Mineworkers District 50,* 355 U.S. 453, 2 L.Ed.2d 401; *Local 60 United Brotherhood of Carpenters* v. *NLRB,* 365 U.S. 651, 6 L.Ed.2d 1; See IV Jenkins, *Labor Law,* p. 181ff., §§ 22.3-22.4 and cases there cited.

[21] Cf. *Morrison-Knudson* v. *NLRB,* 278 F.2d 63 (C.A. 9, 1961); *Morrison-Knudson* v. *NLRB,* 275 F.2d 914 (C.A. 2, 1961). In the *Morrison-Knudson* cases, NLRB, upon a finding that a union contract violated § 8(b) of the Labor statute, granted a general reimbursement of dues to all employees covered by the unlawful agreement. But the proof was that only five were adversely affected by the unlawful contract. The Ninth Circuit held the awards to those who were not adversely affected was "punitive," not "remedial" and set it aside, 278 F.2d 63. Similarly, the Second Circuit set aside the NLRB's "windfall" award to those not shown to have been adversely affected by the unfair labor practice, 275 F.2d 914 at 918. This Court in *United Brotherhood of Carpenters, supra,* made a similar holding.



port in the evidence" that individual beneficiaries of an NLRB Order were adversely affected in violation of the Labor Act. *Carpenters,* 365 U.S. at 656.

Without regard to this authority, the Government in the Court of Appeals in the instant case asserted that proof of the employer's pattern of discrimination in hire, obviates the necessity of proof that individuals suffered thereby, and permits awards of money and seniority to each individual in the "class" without regard to proof of discrimination or damage. Thus the Government asserted: "The introduction of testimony as to the extent individuals seeking relief were damaged by discrimination would be unduly burdensome on the parties and wasteful of the Court's time."[22] The Court of Appeals agreed that "it would defy reason and waste precious resources for the Court either to require or permit individualized proof . . .,"[23] yet specified that the entire "affected class" was to have augmented seniority.[24]

The Government *now* asserts (Brief, p. 53ff.) that this was proper for two reasons—one: that identification of victims, and ascertainment whether seniority or pay was lost, should await the "remedy" stage;[25] and two: that the District Court misapplies burden of proof.

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[22] Government Brief to Court of Appeals at p. 44.

[23] P.A. 34, 517 F.2d 319.

[24] P.A. 35, 517 F.2d at 319. ". . . all members of the affected class rather than just a selected few."

[25] This obviously did not occur to the government until it prepared its brief on the merits in this Court. Back pay was distributed to "each alleged individual and class discriminatee" P.A. 92. And the relief sought was fully specified and litigated. Cf. App. 195ff. and App. 728.

## A.

### Bifurcated Trial

Liability and remedy were fully litigated in the District Court. No litigant has asserted otherwise. The notion of separate liability and remedy trials originated in the opinion of the Court of Appeals, which did not have the benefit of the parties' views as to the propriety of separate trials in this case. Ordinarily, the bifurcation of Title VII cases into separate "liability" and "remedy" stages can only increase the burden on court and litigants.[26] Here the Government after lengthy nationwide discovery, and inspection of every existing TIME-DC personnel paper made its best proof of both "liability" and "remedy".[27] A judgment was entered which disposed of the entire case.

It will not do to require re-trial of remedy now—on the bare suggestion of the Court of Appeals that "some . . . *may have* suffered discrimination even more egregious than those whom the government singled out . . ." P.A. 34, 517 F2d 299 at 319, (Emphasis added.). The Government does not yet identify any who so "may have suffered." Indeed, there is not even identification of which incumbents "express a present desire to transfer."[28]

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[25] While District Courts should have discretion to do so in appropriate cases, "involving thousands" (517 F.2d 299 at 319), the parties are entitled to advance notice that the trial is in stages. No notice was given here. And the Government has yet to indicate that any individual other than those considered by the District Court even claims to be the victim of racial discrimination.

[27] P.A. 94-116; Amended P.A. 117-124.

[28] The government asserts at Brief 63 that it is "reasonable to infer that those incumbents who express a present desire to transfer would have chosen to do so when they became qualified, and would, absent discrimination, have obtained such a position when the next vacancy arose in that category."

This assertedly "sound conclusion" presupposes that all the almost four hundred blacks and SSA's would have transferred to the road—but that none of the more than 2,000 whites would have done so.



## B.

### Burden of Proof

Yet the Government insists that the burden of proof is on the union to demonstrate which of the almost four hundred minority incumbents were *not* the victims of discrimination. This is justified, the Government says (Brief, p. 53), because "to introduce testimony as to every alleged victim of discrimination in order to make the required showing that individual injury occurred. . ." would be "an enormous practical burden on the government. . ."

How much more of a burden on a union to speculate who might have opted for what job, when, and in what circumstances? And then to require the union to meet the burden of producing testimony regarding each such speculation as to each vacancy,[29] if any, would be to turn the trial upside down and backwards.

If enforcement of Title VII is to follow the Labor Act "model" which this Court has said it must, then the burden of proof of individual discrimination is on those who seek the finding that they are the victims of discrimination.

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[29] Parenthetically, the union is in no better position to produce testimony as to vacancies than is the government. Records as to vacancies, and who filled them are maintained by the employer, who has sole responsibility for hire and job placement. And FBI has photographed every extant personnel paper. It took two years for this government investigation. Surely, in these circumstances the government is better able to bear the burden of proof.

The burden of proof in litigation of allegations of discrimination in regard to hire of tenure of employment in violation of § 8(a)(3) of the Labor Act "is always on the (NLRB) General Counsel and never shifts—."[30] In Labor Act cases the Fifth Circuit has redundantly so held.[31]

The Government's insistence that *Franks* v. *Bowman* holds to the contrary is in error. In *Franks* it was given that an identified group of actual applicants had been denied employment because of their race.[32]

The problem there was one of proper remedy. Here, at most, it is given only that the employer has engaged in a pattern of discrimination. The problem is to identify those who were the victims of discrimination.

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[30] II Jenkins, *Labor Law* (Anderson Co., Cincinnati, 1969) at § 7.59 and cases there cited. Accord: 3 Kheel, *Labor Law* (Matthew Bender, N.Y., 1973) at § 12.03(8), § entitled "Burden of Proof," and cases there cited.

[31] *NLRB* v. *McGahey*, 233 F.2d 406; *NLRB* v. *Sutphin Atlanta, etc.*, 373 F.2d 890; *NLRB* v. *Neuhoff Packers*, 398 F.2d 640 at 647; *NLRB* v. *Bogart Sportswear*, 485 F.2d 1203 at 1208. "The burden is on the General Counsel to prove, and not on the employer to disprove that the discharges were discriminatory."

Cf. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 18 L.Ed.2d 1027 (1967) which places upon the respondent employer the burden of going ahead with the evidence, after it is first shown that employment has been denied—with the burden of proof remaining with the General Counsel. See Kheel, *supra*, Vol. 3 at p. 12-227. Cf. *NLRB* v. *Fibers Intl. Corp.*, 439 F.2d 1311 (C.A. 1, 1971) and the many cases there cited.

[32] See — U.S. —, 47 L.Ed.2d at 458: "The black applicants for OTR positions composing class 3 are limited to those whose applications were put in evidence at the trial." This Court then noted (Fn. 10) that ". . . only post-Act victims of racial discrimination are members of class 3"—all between the periods 1970 to January 1, 1972.



The burden of proof to identify them—and to make *prima facie* showing that specified individuals have suffered racial discrimination is on plaintiff. Otherwise the Labor Act models are jettisoned.[33]

Whether individual, class, or pattern or practice—the inquiries and burdens of proof in Title VII cases should follow the Labor Act model. Those who demonstrate they have been denied [34] employment because of racial discrimination should be made whole—compensated by the party who denied the employment, and given "rightful place" seniority. But it does not make sense to provide more (or less) relief for the same

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[33] Once this burden has been met, there may come burdens upon defendants to explain or justify; e.g. if A proves he wished to transfer to a road job at a particular time—and was refused the opportunity, justification for such refusal should be the burden of the party alleged to have so refused. This was just what occurred with respect to the fifty or so individual claims presented to the district court (of which thirty-four were found to have merit)—and is consistent with the *McDonnell-Douglas* procedure specified by this Court, 411 U.S. 792.

Cf. *U.S.* v. *Leeway Motor Freight*, W.D. Okla., CCH Emp. Prac. Guide at § 5284.

[34] Ordinarily proof of "denial" would require proof that the claimant made some type of claim.

We acknowledge that where it is proved that application would be futile, no application should be required; but "futility" of application should not be assumed, without proof. Cf. *Thornton* v. *ETMF*, 497 F.2d 416 (C.A. 6, 1974).

Note that the Department of Transportation Regulations, App. 841-894, *require* written applications for road positions. App. 846-894 at 844-5.

See § 391.21 "Application for employment: (a) except as provided in subpart G of this part, a person shall not drive a motor vehicle unless he has completed and furnished the motor carrier that employs him with an application for employment that meets the requirements of paragraph (b) of this section." Motor Carrier Safety Regulation, § 391.21(a); App. 846.

substantive violation, depending only on whether the form of action is individual, class, or pattern. Whatever the form of action, the only purpose is to "make whole" and enjoin recurrence of racial discrimination.

### THE GOVERNMENT'S SHIFT IN POSITION

We have seen that the Court of Appeals specified a remedy permitting *all* members of the affected class, rather than just a selected few, to be permitted to exercise their full seniority (P.A. 34; 517 F.2d 299 at 319).

Despite the Circuit Court's clear insistence on wholesale carryover of qualification date seniority for the entire class, the Government's brief (p. 39), asserts that "petitioners will have their opportunity in accordance with *Franks* to rebut the prima facie case as to individual claimants when class members seek their remedy."

That is exactly what the Court of Appeals held could *not* be done. Indeed, the Government in its Opposition to Certiorari herein, at pp. 15-17, argues the correctness of the full carryover seniority determination of the Court of Appeals, and insists "the Courts need not engage in exhaustive case by case analysis of the treatment of each minority employee", and "it would defy reason and waste precious judicial resources for the court either to require or permit individualized proof for every member of the class . . . "

So all effective means of obtaining determination of individual "rightful place" are foreclosed, and the "remedy hearing" becomes illusory if, as the Government insists, the law of the case has been established, and the decision of the Court of Appeals stands that the class, *qua* class, is to have full carryover seniority.



With respect, we suggest that the Government's representations in its brief to this Court that "petitioners will have their opportunity to rebut the prima facie case as to individual claimants when class members seek their remedy" is flatly contrary to everything the Government has argued to this point, and is contrary to the holding in the Court of Appeals in this case, as well as in *Rodriguez*. See 505 F.2d 40 at 63ff.

In short, the Government takes three positions which seem to us wholly inconsistent: (1) that all incumbent minorities are entitled to full carryover seniority as held by the Court of Appeals, (2) that "petitioners will have their opportunity in accordance with *Franks* to rebut the prima facie cases as to individual claimants when class members seek their remedy";[35] and (3) that petitioners "opportunity" will be limited by the fact that all minority claimants have full seniority and the analytical steps by which seniority is to be determined (in *McDonnel-Douglas, supra,* p. 30) are not applicable in this case.

Rather, we say, the Court of Appeals should be reversed and the District Court affirmed.[36]

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[35] Cf. Government Brief, p. 24.

[36] Except that the District Court's "Order Amending, etc." (P.A. 117-118) which provides discriminatory preference in order of transfer (but not seniority) has the effect of blocking all whites' transfers until all blacks are first transferred. See our Original Brief at page 14, note 23, and P.A. 65 as amended by P.A. 117. This should be corrected on remand. The former position (P.A. 65) is unobjectionable. The latter discriminates against whites and prefers blacks who have not been adversely affected by any law violations.

## THE DENIAL OF PROTECTION TO LAID-OFF EMPLOYEES

The pertinent collective bargaining agreements recognize the economic facts of life in the motor carrier industry, including the fact that employment fluctuates with the public's demands for service. Accordingly, protections for incumbent employees against lay-off and assurances of recall for incumbent drivers are sought by the union in collective bargaining, and have resulted in the employee protections in Article 4, § 1 of the collective bargaining agreement, viz; App. 804:

> " . . . Seniority shall only be broken by discharge, voluntary quit, more than a three year lay-off or . . . as provided in any applicable provision of the Supplemental Agreements . . . "[37]

The road agreements in the South further provide that laid-off road drivers at a particular terminal may exercise seniority to bump-in to another road terminal displacing any road drivers there with less seniority. (App. 49)[38]

These conventional collectively-bargained protections of incumbents were not adopted for any discriminatory purpose. The Court of Appeals acknowledges, P.A. 41, 517 F.2d at 322:

> We recognize that the Union contract provision granting laid-off LD's a three-year period in which they may move into vacancies at their home terminal without competition was not adopted for discriminatory purposes. Nevertheless, we believe

[37] The Supplement (App. 823) at Article 42, § 1 contains similar language; then specifically requires the employer to give notice of recall, and provides recall procedures. See App. 823.

[38] The agreement also requires, App. 50, that "Drivers on layoff who have not exercised their seniority at some other terminal shall be recalled to work in accordance with the Road Agreement.



> that to allow LD's a three-year priority right on future openings would unduly impede the eradication of past discrimination.

The District Court had provided that identified victims of racial discrimination could move into "vacancies"—and had specified that "a vacancy shall not exist where there are laid-off employees on the seniority roster . . . However, if such lay-off continues for three consecutive years the position will be deemed as vacant . . . " P.A. 98, 517 F.2d at 322, note 44.

Thus, these admittedly non-discriminatory, conventional collectively-bargained protections for incumbents were honored by the District Court.

The Court of Appeals, however, having awarded discriminatees augmented seniority to provide "the incentive to transfer"[39] road to city, then effectively eliminated the contractual protection of laid-off drivers. The stated rationale was, P.A. 41, 517 F.2d 323:

> "We think that such modification will accommodate the discriminatees' right to advancement . . . ."[40]

[39] The Court of Appeals wrote, P.A. 31-32, 517 F.2d 318:

> The purpose of seniority carry-over under the rightful place doctrine is to give the discriminatee the incentive to transfer by removing the major disincentive to such transfer (loss of accumulated seniority). It also gives the discriminatee enough seniority in the new unit to permit effective competition for advancement and to provide the protection against the threat of layoff to which the discriminatee would be exposed because of the initial discrimination. *Bethlehem Steel, supra,* at 660; *Bing* (II), *supra,* at 450; *Local 189 Papermakers, supra,* at 988.

[40] The concept of "right to advancement" pertinent in line of progression seniority systems is wholly inapposite to the seniority systems applied here. In line of progression seniority cases—the seniorty "escalates" from department to department. Here, hiring is at top rates and movement either way is minimal. In most of the industry it is employer-barred. See our original brief, p. 32, note 58.

Actually it does much more. The incumbent city driver (already working at top wages and under excellent working conditions in the city) displaces the laid-off road employee. The road employee is thus effectively deprived of his seniority rights, i.e., in these circumstances, his job. And often the displaced road driver is a black. This hardly advances the high purpose of Title VII.

Likewise, the contracts which permit incumbents to exercise their seniority rights to bump in to other terminals are reformed "to provide that a laid-off L-D (line driver) may not move to another terminal where a vacancy exists . . ." P.A. 42, 517 F.2d at 323. The only stated rationale is that the cited provisions of the collective agreements "would tend to impede the advancement of blacks and SSA's into LD positions." 517 F.2d at 323.

Quite candidly, the Court of Appeals obliterates seniority protections in order to provide minorities "the incentive to transfer" and to remove whatever "would tend to impede the advancement of blacks . . ."

Court orders tailored for these purposes may, indeed, hasten the day when the sins of ten generations of our forefathers are expiated. But the Congress refused to go so far—the statute permits only "rightful place;" and quite specifically prohibits "preferential treatment to any . . . group because of the race color . . . or national origin of such . . . group on account of an imbalance which may exist . . ." Act. § 703(j). Or as the Chief Justice put it in *Griggs;* 401 U.S. at 431: "Discriminatory preference for *any* group, minority or majority, is precisely and only what Congress has proscribed."



Accordingly, the Court of Appeals should be reversed, and the District Court directed to provide a "make whole" seniority remedy limited to the individual victims of racial discrimination.

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